Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1561

CHARLES WINFRED CARPENTER, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

CHARLES WINFRED CARPENTER, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit to review the final order of that Court entered February 4, 1980, which affirmed petitioner's conviction and five year sentence under the Hobbs Act.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported by Slip Opinion dated February 4, 1980, bearing Court of Appeals No. 79-5209, and is set forth in Appendix A hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was filed February 4, 1980. A petition for rehearing was timely filed and was denied by an Order entered on March 7, 1980, at which time the decision appealed from became final.

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Is the Bank Robbery Statute, 18 U.S.C., Section 2113(a) the exclusive criminal charge available to the Government in a case involving extortion of a federally insured bank as held by the Ninth Circuit Court of Appeals, or is the Fifth Circuit Court of Appeals correct in holding that the Hobbs Act, 18 U.S.C., Section 1951 is also a proper charge under the same facts?

2. Did the admission into evidence of a statement obtained from the petitioner while he was under arrest,

and had twice requested to consult with an attorney violate his Fifth Amendment right to remain silent and his Sixth Amendment right to counsel?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the Constitution of the United States.

2. The Sixth Amendment to the Constitution of the United States.

3. Title 18 United States Code, Section 2113, set forth in Appendix D, post.

4. Title 18 United States Code, Section 1951, set forth in Appendix E, post.

5. Title 18 United States Code, Section 924(c).

STATEMENT OF THE CASE

This case presents two separate and clearly defined issues. The first is whether or not the Federal Bank Robbery Statute, 18 U.S.C., Section 2113 is the exclusive charge available to the Government in prosecuting a bank extortion.

The second issue involves a fact situation similar to a case which was recently argued before this Court,

Rhode Island v. Innis, 1978, Supreme Court No. 78-1076, wherein a confession was introduced into evidence in a criminal trial over the objection that it was obtained by subtle in-custody interrogation in absence of counsel, and that counsel was not waived, but was repeatedly requested.

On December 19, 1978, the petitioner, Charles Winfred Carpenter, Jr., was named in two counts of a three-count indictment returned by the Federal Grand Jury sitting in Tyler, Texas for the Eastern District of Texas. The indictment charged the petitioner with violation of the Hobbs Act by attempted extortion of the First National Bank of Jacksonville, Texas and with violation of Title 18, U.S.C. 924(c), use of a firearm in the commission of a Federal felony.

After a three-day trial in Federal District Court which concluded on March 21, 1979, the petitioner was convicted of the Hobbs Act charge and acquitted on the firearms charge. On April 2, 1979, petitioner was sentenced to serve five years in the custody of the Attorney General. Petitioner gave notice of appeal of his conviction and sentence to the United States Court of Appeals for the Fifth Circuit on April 5, 1979.

On February 4, 1980 the Circuit Court rendered its decision. The Circuit Court rejected all of petitioner's arguments and authorities and affirmed petitioner's conviction.

A Petition for Rehearing was filed by petitioner specifically pointing out to the Court that its opinion did not deal at all with the issue of whether or not the Bank Robbery Statute was the exclusive charge available to the Government. The Court of Appeals had disposed of the issue by holding this Court's opinion in *United States v. Culbert*, 435 U.S. 371, (1978) to be dispositive of the issue of whether or not the Bank Robbery Statute is the exclusive charge available in a bank extortion, (post, Appendix A).

It was also pointed out in the petition for rehearing that the Circuit Court in its desire to avoid what it termed "the Brewer caldron", had avoided the issue of whether or not the Government had discharged its heavy burden to show waiver of the petitioner's right to counsel before giving a statement that was introduced into evidence against him at trial. The Circuit Court simply relied on the finding of the trial court that no in-custody questioning of petitioner occurred. The petition for rehearing was denied on March 7, 1980, without opinion. (post, Appendix C.)

STATEMENT OF REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision below, because it essentially chose to avoid the issues presented by petitioner, has created a conflict with the Ninth Circuit Court of Appeals decision that the Bank Robbery Statute is the exclusive

charge available to the Government when a kidnap-extortion of a bank is attempted. The decision below also has the effect of making the trial court's decision on whether or not a criminal defendant was interrogated after requesting an attorney dispositive of that issue. Admittedly this holding would lighten the load of appellate courts, but the Constitution and Statutes of the United States make this Court the final Arbiter of the Fifth and Sixth Amendment rights, not the District Courts.

1. The Fifth Circuit Court's Opinion is in Conflict With the Ninth Circuit Court's Opinion on the Exclusive Charge Issue.

The Ninth Circuit Court of Appeals in *United States v. Snell*, 550 F.2d 515 at 518 held:

> "Agreeing, as we do, that the bank robbery statute provides the exclusive remedy for conduct within its coverage, we are compelled to reverse Schmidt and Snell's convictions for attempted extortion."

The defendants in *Snell* had been indicted and convicted under the Hobbs Act for attempted extortion of a bank. The defendants attempted to kidnap and hold for ransom the wife of the manager of a Federally insured bank. The facts of the case at bench are the same except that the kidnapping of a bank officer's family

member was accomplished which would put this case further into the coverage of the bank robbery statute.

The Fifth Circuit held that this Court's decision in *United States v. Culbert*, 435 U.S. 371 (1978) disposed of the issue presented by *Snell*. The Fifth Circuit's opinion did admit that *Culbert* was broadly worded on this precise issue.

It is the contention of the Petitioner that *Culbert* did not deal at all with this issue, but expressly reserved the issue as revealed in footnote one of the *Culbert* decision. This Court stated in response to the Solicitor General's denial of the United States Attorney's authority to concede that the bank robbery statute had no application in bank extortion cases:

> "We express no view on the validity of the United States Attorney's interpretation of 18 U.S.C. 2113(a)."

This Court's opinion in *Culbert* appears to deal with essentially a certified question of whether or not "racketeering" is a necessary element of proof in a Hobbs Act violation. The fact that a Federally insured bank was the intended victim of the extortion scheme was given no consideration by the Court in reaching its decision.

The bank robbery statute is an extremely comprehensive statute which has grown with the need to pro-

tect Federally insured banks. The Hobbs Act was certainly not designed to protect banks — but interstate commerce in general. Certainly, the general should yield to the specific. This is particularly true in kidnap-extortion situations. It was argued in the Court below that the bank was *not* the intended victim at all — but the *parents* were the intended victims of the extortion. The wealthy parents just happened to be officers of a Federally insured bank.

The decision of the Court below extends the Hobbs Act protection to bank employees in kidnap-extortion situations. This result is not what Congress intended because the States are not preempted from intra-state kidnapping. The Ninth Circuit Court's ruling that the bank robbery statute is the exclusive charge available to the Government in a kidnap-extortion situation results in protecting bank assets when they are threatened by kidnap-extortion as Congress intended and not wealthy bank employee assets as Congress did not intend.

This Court should resolve this conflict in the circuits by holding the bank robbery statute to be the exclusive charge available to the Government in a kidnap-extortion situation. Such a decision would represent the intent of Congress and would avoid prosecutions of state kidnapping charges in Federal Court under the guise of Hobbs Act violations.

2. The Court below Refused to Review the Petitioner's Claim that His Fifth and Sixth Amendment Rights Were Violated by Subtle In-Custody Interrogation in the Absence of Counsel.

The record of the trial court reveals that the Petitioner was arrested at his residence and advised of his Miranda rights after which he requested an attorney. A few minutes later he was again advised of his rights, and he again requested an attorney. During the ride to jail with two FBI agents, certain conversations took place which resulted in Petitioner making incriminating statements which were admitted at trial over the objection that the statements were gained by trickery and were not voluntary. It was uncontroverted that they were made in the absence of counsel.

The District Court heard testimony of the Petitioner at the suppression hearing which detailed the conversations of the FBI agents concerning veiled threats to arrest his girl friend and comments on what a "sloppy joe" the extortion had been. In response the FBI agents stated that no questions had been asked, and that for no apparent reason, the defendant just started talking. The District Court found:

> ". . . in spite of the fact that (Carpenter) said that he wanted counsel, the FBI did not ask any question of the defendant . . . and volun-

> tarily, without any questioning on the part of the FBI agents, (Carpenter) made the statements that he made." (post, Appendix A)

Based upon this finding, couched exclusively in terms of questioning, the Court below held that the factual findings properly made by the District Court, placed them well outside the "*Brewer* caldron". The Court was, of course, referring to this Court's decision in *Brewer v. Williams*, 430 U.S. 387 (1977). *Brewer* involved a situation like the case at bench in that counsel had been unequivocally requested and no questions were asked of the defendant in the absence of counsel. A subtle form of interrogation by the arresting officer resulted in violation of the defendant's Fifth and Sixth Amendment rights.

This Court has recently heard argument in *Rhode Island v. Innis* (supra). The reviewing Court in *Rhode Island* did not rely on the trial court's finding that no interrogation occurred and reversed the conviction relying on *Brewer* and its teaching that interrogation and violation of Constitutional rights can occur without direct questioning. All that the District Court found in the case at bench was that *no* questioning occurred. This finding was the *sole basis* for the Circuit Court's rejection of Petitioner's claim that he was interrogated while under arrest and in the absence of counsel which he had requested.

Neither the trial court nor the Court of Appeals had found that the Petitioner was not the victim of subtle in-custody interrogation in the absence of counsel. All that has been determined is that the Petitioner was not directly questioned. The Petitioner has never asserted that he was directly questioned. What he has consistently claimed and what no Court has rejected, is that his Fifth and Sixth Amendment rights were violated by subtle in-custody interrogation in the absence of requested counsel.

This type of interrogation has been condemned by this Court in *Brewer*.

Petitioner respectfully requests that it also be condemned in his case.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this Petition for a writ of certiorari be granted.

Gary Hagman
Attorney for Petitioner

CERTIFICATE OF SERVICE

This is to certify that three printed copies of the foregoing petition for a writ of certiorari have been placed in the United States mail, postage pre-paid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530.

Signed this ____ day of April, 1980.

Gary Hagman

APPENDIX A

OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES of America,
Plaintiff-Appellee,

versus

Charles Winfred CARPENTER, Jr.,
Defendant-Appellant.

No. 79-5209
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Feb. 4, 1980

Appeal from the United States District Court for the Eastern District of Texas.

Before BROWN, TJOFLAT and FRANK M. JOHNSON, Jr., Circuit Judges.

JOHN R. BROWN, Circuit Judge:

This appeal concerns an attempt to extort $38,000 from a federally insured bank by means of kidnapping the son of two of the bank's officers. For this crime, Charles Winfred Carpenter, Jr. was convicted of violating the Hobbs Act, 18 U.S.C.A. §1951, and sentenced to five years in prison. He appeals the conviction, contending that (i) he did not commit a federal crime because the attempted extortion was directed solely at the parents of the kidnapped victim, not at the bank, (ii) the exclusive federal remedy for the crime was the Bank Robbery Act, 18 U.S.C.A. §2113, not the Hobbs Act, and (iii) incriminating statements admitted at trial were obtained in violation of the Fifth Amendment. We affirm.

I.

Jeff Austin, III, was abducted from his home on the morning of October 18, 1978. Jeff is the son of Jeff Austin, Jr. and Sissy Austin, the president and vice-president, respectively, of the First National Bank of Jacksonville, Texas. The abductor, without asking Jeff where his parents worked, then proceeded to dial the telephone number of the bank and to force Jeff to attempt to speak to either or both of his parents. Jeff spoke to Mrs. Austin and indicated that his abductors wanted $38,000 for Jeff's safe return. Further telephone calls directed Mrs. Austin to begin a series of steps resulting in her leaving the money at a spot near "Love's Lookout."

The first drop off of the money was unsuccessful, however. Yet another call was placed to Mrs. Austin in order to arrange a second drop off for the money. During that telephone conversation, the abductor stated that "the bank" had interfered with the first drop off. Mrs. Austin was directed to make sure that bank personnel did not interfere a second time. She was also told to "call *the bank* and again have $38,000 of money packaged in tens and twenties. . ." Mrs. Austin complied and delivered a second package of money to a different location, where the money was picked up by two young boys. The boys later identified Carpenter as the man who promised to pay them for picking up the money.

These facts establish that the extortion was directed at the bank and not solely at the parents. Both parents were officers of the bank, with authority to direct the use of bank monies. A very large amount of money was demanded. The abductor knew without asking that both parents worked at the bank. And statements made over the telephone also indicated that the abductor was looking to the bank's assets for payment, not solely to the assets of the parents.

Under very similar facts, the Eighth Circuit has rejected Carpenter's argument. *United States v. Johnson*, 516 F.2d 209, 214, *cert. denied*, 1975, 423 U.S. 859, 96 S.Ct. 112, 46 L.Ed.2d 85. Moreover, we stated in *United States v. Gupton*, 5 Cir., 1974, 495 F.2d 550, that it is only

necessary to show that the "extortionate behavior [was] *likely to have the natural effect* of obstructing commerce." *Id.* at 551 (emphasis supplied). The abduction and extortionate telephone calls in this case were certainly *likely* to cause the bank's assets to be drawn upon. And in fact the bank's assets, not those of the parents, were used. There was certainly adequate evidence from which a jury could have concluded that the extortion was directed against the bank. *Glasser v. United States*, 1942, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; *United States v. Malatesta*, 5 Cir., 1979, 590 F.2d 1379 (en banc). We therefore reject Carpenter's first point of error.

II.

The contention that the Bank Robbery Act is the exclusive federal remedy for cases involving extortion on banks would have been a more substantial argument prior to the Supreme Court's recent decision in *United States v. Culbert*, 1978, 435 U.S. 371, 98 S.Ct. 1112, 55 L.Ed.2d 349.[1]

In *Culbert*, the defendant was convicted in the District Court of attempted bank robbery under 18 U.S.C.A. §2113(a) and of extortion under the Hobbs Act. As in Carpenter's case, the *Culbert* defendant had used tele-

1 There are no Double Jeopardy concerns here, nor does Carpenter argue any. Carpenter was convicted and sentenced under only one statute — the Hobbs Act. Thus, *United States v. Golay*, 8 Cir., 1977, 560 F.2d 866, 869-70, and *United States v. Beck*, 6 Cir., 1975, 511 F.2d 997, 999-1000, are distinguishable.

phoned threats in an attempt to force a bank officer to leave a large amount of bank money at a specified location. On appeal to the Ninth Circuit, the Bank Robbery Act conviction was abandoned by the Government.[2] Consequently, the Supreme Court considered the issue of whether the Hobbs Act covered bank extortion. 435 U.S. at 372 n. 1, 98 S.Ct. at 1113 n. 1, 55 L.Ed.2d at 351 n. 1.

In a broadly worded opinion, the Hobbs Act conviction was sustained. The *Culbert* opinion focused on a rejection of the Ninth Circuit's theory that the Hobbs Act was limited to "racketeering" crime. But an examination of the precise facts and issue in *Culbert* makes clear that *Culbert's* holding was that the Hobbs Act may be used to prosecute attempted bank extortions. Thus, on the basis of *Culbert's* holding, Carpenter's second point of error is easily rejected.[3]

2 *United States v. Culbert*, 9 Cir., 1977, 548 F.2d 1355, 1356-57. The Ninth Circuit relied not only on the Government's abandonment but also upon the argument that attempted bank extortion did not fulfill 18 U.S.C.A. §2113(a)'s requirement that the money be taken "from the person or presence of" the bank officer.

The Government apparently withdrew its concession by the time that the case reached the Supreme Court, 435 U.S. at 372 n. 1, 98 S.Ct. at 1113 n. 1, 55 L.Ed.2d at 351 n. 1, and attempted to reargue the issue after the Supreme Court remanded the case to the Ninth Circuit. There, the Ninth Circuit adhered to its dismissal of the Bank Robbery Act count, however, "for the reasons set forth in our first opinion . . ." *United States v. Culbert*, 1978, 581 F.2d 799.

3 While we rely on *Culbert*, yet another consideration supports our disposition of this issue. For even assuming (i) *Culbert* inapplicable and (ii) that the Bank Robbery Act unambiguously covered the crime of bank extortion, indictment under the more lenient

Hobbs Act was an acceptable exercise of prosecutorial discretion. Indeed, a long line of cases has held that where an act violates more than one criminal statute, the Government can prosecute under even the harshest statute which proscribes the act. *E.g., United States v. Beacon Brass Co.*, 1952, 344 U.S. 43, 46, 73 S.Ct. 77, 79, 97 L.Ed. 61, 65; *United States v. Carter*, 5 Cir., 1976, 526 F.2d 1276, 1277-78; *United States v. Smith*, 5 Cir., 1975, 523 F.2d 771, 780 (identical felony and misdemeanor statutes involved); *United States v. Chakmakis*, 5 Cir., 1971, 449 F.2d 315, 316 (identical felony and misdemeanor statutes involved); *Ehrlich v. United States*, 5 Cir., 1956, 238 F.2d 481, 485.

Nor is it significant that the identical facts might prove both a Hobbs Act and a Bank Robbery Act violation. *United States v. Smith, supra; United States v. Chakmakis, supra.* This is not a *Blockburger v. United States*, 1932, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309, situation involving cumulative punishment, or even dual prosecution, under the two statutes. The legisiative history of the two statutes gives no indication of whether one statute or the other is to be exclusive with respect to bank extortion. *See United States v. Culbert*, 9 Cir., 1977, 548 F.2d 1355, 1359 (Carter, J., dissenting), *rev'd*, 435 U.S. 371, 98 S.Ct. 1112, 55 L.Ed.2d 349; *United States v. Marx*, 10 Cir., 485 F.2d 1179, 1182, *cert. denied*, 1973, 416 U.S. 986, 94 S.Ct. 2391, 40 L.Ed.2d 764. Where this is the case, the recent Supreme Court case of *United States v. Batchelder*, 1979, ___ U.S. ___, 99 S.Ct. 2198, 60 L.Ed.2d 755, permits prosecution under even the statute with the greater penalty.

In *Batchelder*, two separate provisions of the same Act of Congress prohibited felons from receiving firearms. One provision carried a five-year maximum, the other a two-year maximum sentence. The Court held that the Government was free to prosecute under the more punitive statute. In reaching that result, it stated:

> Nor can [one statute] be interpreted as implicitly repealing [the other] whenever a defendant's conduct might violate both. . . . for it is "not enough to show that the two statutes produce differing results when applied to the same factual situation." . . . *Rather, the legislative intent to repeal must be manifest in the " 'positive repugnancy between the provisions.' "* . . .

Id. at ___, 99 S.Ct. at 2203, 60 L.Ed.2d at 763 (citations omitted) (emphasis supplied). Thus *Batchelder* certainly allows the Government to choose the equally lenient or more lenient Hobbs Act when prosecuting bank extortions such as Carpenter's. *See United States v. Brown*, 9 Cir., 1979, 602 F.2d 909 (applying *Batchelder* to a situation involving 18 U.S.C.A. §2113(a)).

III.

Carpenter lastly contests the admission of certain incriminating statements which he made shortly after his arrest. In so doing, he attempts to immerse us in a caldron of questions concerning the Fifth Amendment, which has been percolating in the lower courts since *Brewer*.[4] Factual findings properly made by the District Court place us well outside this caldron, however. Instead, we rely upon other long-standing and unimpeached precedent in rejecting Carpenter's last point of error.

Carpenter made a number of incriminating statements soon after his arrest by FBI agents Kieny and Meese, on the evening of October 18, 1978.[5] At the

4 *Brewer v. Williams*, 1977, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424. For indications of the content of the caldron, see: *Stanley v. Wainwright*, 5 Cir., 1979, 604 F.2d 379, 382; *United States v. Boyce*, 9 Cir., 1979, 594 F.2d 1246, 1250-51; *United States v. McCain*, 5 Cir., 1977, 556 F.2d 253; *United States v. Jordan*, 5 Cir., 1977, 557 F.2d 1081, 1083-86. *See generally*, Kamisar, *Brewer v. Williams, Messiah, and Miranda: What Is "Interrogation"? When Does It Matter?*, 67 Geo.L.J. 1 (1979). One case involving facts similar to those alleged by Carpenter (but rejected by the District Court) is under consideration by the Supreme Court at present. *Rhode Island v. Innis*, R.I., 391 A.2d 1158, *cert. granted*, 1978, 440 U.S. 934, 99 S.Ct. 1277, 59 L.Ed.2d 492.

5 The statements in question were certainly not harmless beyond a reasonable doubt. *United States v. Stewart*, 5 Cir., 1978, 576 F.2d 50, 55-56. It is uncontested that Carpenter stated that his girlfriend was not involved in "this matter" and that he had purposely quarreled with her in order to get her away from Love's Lookout (where the money was first left by Mrs. Austin). *Cf. United States v. Robertson*, 5 Cir., 1978, 582 F.2d 1356 (en banc) (incriminating statements made by defendants attempting to prevent

scene of the arrest, the agents advised Carpenter of his *Miranda*[6] rights, both orally and in writing. After each warning, Carpenter indicated that he wanted to consult an attorney before making a statement. Shortly thereafter, the two agents set out with Carpenter for the local FBI office. The twenty-minute automobile ride was interrupted once by a stop at a restaurant in order to get a soft drink for Carpenter. During the automobile trip, Carpenter made the incriminating statements admitted at trial and challenged here.

Both agents testified that during the trip they engaged in sporadic conversation between themselves concerning "everyday" matters, but at no point spoke about the Carpenter case or any other FBI matter. Both agents also testified that the only question asked Carpenter was whether he wanted a soft drink. Carpenter's statements came during "some long periods of silence, at which Mr. Carpenter apparently felt like he had to say something, and he did."

The defendant's version was quite different. Carpenter essentially testified that the FBI agents engaged in a form of subtle interrogation during the automobile trip, similar to but not so dramatic as the "Chris-

their wives from being charged by the police.) He further stated, "A man does strange things with these kinds of [financial] pressures." And in the presence of one FBI agent, Carpenter spoke of his financial problems and stated that he wasn't in charge of "this thing", but instead that he took all of his orders over the telephone.

6 *Miranda v. Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

tian burial" speech of Police Officer Leaming in *Brewer*. Carpenter testified that the agents made several statements about the extortion, including remarks that, "It sure was a sloppy job," that the agents couldn't understand how his girlfriend got involved, and that another case which the agents were investigating was a much more "professional job." The agents, however, on cross-examination, denied making any such statements.[7]

After hearing both versions, the Trial Judge permitted the agents to testify before the jury concerning Carpenter's statement. The Judge found that "in spite of the fact that [Carpenter] said that he wanted counsel, the FBI did not ask any question of the defendant . . . and voluntarily, without any questioning on the part of the FBI agents, [Carpenter] made the statements that he made." While this finding speaks in terms of "questioning," it is truly a finding — when read in context with the rest of the record — that the FBI agents *neither* made *Brewer*-type "statements" nor posed "questions" as such. The Trial Judge was certainly permitted to credit only the testimony of the FBI agents. The Judge's finding is not clearly erroneous.

We have frequently facted the situation in which a defendant invokes his *Miranda* rights and then, with-

7 The only, slight qualification is that one agent, Mr. Kieny, stated that he did not *remember* discussing another, more "professional" bank theft. Thus Agent Kieny did not flatly state that the subject was not in fact discussed.

out further accusatory statements or questioning by the authorities, initiates a statement which turns out to be incriminating. Such spontaneous, unprovoked statements do not violate the principles of *Miranda*, simply because the requisite element of Government "interrogation" is lacking. Consequently, we have uniformly upheld the admission of such statements. *E.G., United States v. Rieves*, 5 Cir., 1978, 584 F.2d 740, 743-44, 745-46; *United States v. Savell*, 5 Cir., 1977, 546 F.2d 43, 45-46; *Pilcher v. Estelle*, 5 Cir., 1976, 528 F.2d 623, 625; *United States v. Hopkins*, 5 Cir., 1970, 433 F.2d 1041, *cert. denied*, 1971, 401 U.S. 1013, 91 S.Ct. 1252, 28 L.Ed.2d 550; *Sellers v. Smith*, 5 Cir., 1969, 412 F.2d 1002, 1005. *See also Miranda v. Arizona*, *supra*, 384 U.S. at 478, 86 S.Ct. at 1630, 16 L.Ed.2d at 726 ("volunteered statements of any kind are not barred by the Fifth Amendment"); *United States v. Cobbs*, 3 Cir., 481 F.2d 196, 200-01, *cert. denied*, 1973, 414 U.S. 980, 94 S.Ct. 298, 38 L.Ed.2d 224; *Cannistraci v. Smith*, S.D.N.Y., 1979, 470 F.Supp. 586, 590-92. We therefore escape the *Brewer* caldron that Carpenter would place us in, and reject his final point of error.

AFFIRMED.

APPENDIX B

JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5209
Summary Calendar

D.C. Docket No. Ty-78-41-CR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES WINFRED CARPENTER, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

February 4, 1980

Before BROWN, TJOFLAT and FRANK M. JOHNSON, JR., Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

the Eastern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction of the said District Court in this cause be, and the same is hereby, affirmed.

ISSUED AS MANDATE:

APPENDIX C

DENIAL OF REHEARING BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-5209

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

CHARLES WINFRED CARPENTER, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING
March 7, 1980

Before BROWN, TJOFLAT, and FRANK M. JOHNSON, JR., Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ FRANK M. JOHNSON, JR.
United States Circuit Judge

APPENDIX D

THE BANK ROBBERY STATUTE

§2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 or belonging to, or in the care, custody, control, management, or possession of

any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any per-

son, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any "insured institution" as defined in section 401 of the National Housing Act, as amended, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act.

(h) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the Administrator of the National Credit Union Administration.

As amended Aug. 3, 1950, c. 516, §1, 64 Stat. 394; Apr. 8, 1952, c. 164, 66 Stat. 46; Sept. 22, 1959, Pub.L. 86-354, §2, 73 Stat. 639; Oct. 19, 1970, Pub.L. 91-468, §8, 84 Stat. 1017.

APPENDIX E

THE HOBBS ACT

§1951. Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

Supreme Court, U. S.
FILED
MAY 29 1980
MICHAEL RODAK, JR., CLE

No. 79-1561

In the Supreme Court of the United States

OCTOBER TERM, 1979

CHARLES WINFRED CARPENTER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 611 F. 2d 113.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a-12a) was entered on February 4, 1980, and a petition for rehearing was denied (Pet. App. 12a-13a) on March 7, 1980. The petition for a writ of certiorari was filed on April 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government was barred from prosecuting petitioner under the Hobbs Act, 18 U.S.C. 1951, because he was also subject to prosecution for his

extortionate conduct under the federal bank robbery statute, 18 U.S.C. 2113.

2. Whether petitioner's post-arrest statements were improperly admitted into evidence because they were the product of interrogation by FBI agents.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951.[1] He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1a-10a).

The evidence at trial showed that on October 18, 1978, petitioner abducted Jeff Austin, III, the son of a couple who were the president and vice-president of a bank in Jacksonville, Texas (Pet. App. 2a). After forcing the young Austin back into his home at gunpoint, petitioner blindfolded and bound him (Tr. 40-41, 58-60). Petitioner then dialed the telephone number of the bank and directed Austin to speak to his parents (Pet. App. 2a). Austin spoke to his stepmother, told her that he had been kidnapped, and said that the abductor wanted $38,000 in ransom and would contact her in an hour concerning the location for delivery of the money (*ibid.*; Tr. 43-44, 77-78). After the first delivery of the ransom fell through, petitioner called Mrs. Austin to direct that a second delivery be made (Pet. App. 3a). Mrs. Austin had a second $38,000 withdrawn from the bank's general account and complied with petitioner's directions for the dropoff of the package of money (*ibid.*; Tr. 81-83). The money was picked up by two boys, who later

[1]Petitioner was acquitted on one count charging him with using a firearm in the commission of a felony, in violation of 18 U.S.C. 924(c).

identified petitioner as the man who had offered them money for picking up the package (Pet. App. 3a). Unbeknownst to petitioner, Jeff Austin, III, was rescued by police prior to the time that petitioner made another call to Mrs. Austin concerning the second delivery (Tr. 83).

Petitioner was arrested by FBI agents shortly after 6:00 p.m. that same evening (Tr. 345). He was orally advised of his rights but declined questioning and said that he wanted to consult with an attorney (Pet. App. 7a-8a; Tr. 348). He did, however, sign a consent to search form (Tr. 358). No questioning took place during the search. At about 7:00 p.m. petitioner was placed in a car for transportation to the nearest FBI office (Tr. 364). He was again advised of his rights and signed a form indicating that he understood those rights, but he said once more that he did not want to make a statement (Tr. 349-350, 352). Nonetheless, petitioner made incriminating statements during the 20-minute trip to the FBI office (Pet. App. 8a-9a; Tr. 354-356, 365).[2] Petitioner testified at the suppression hearing that the FBI agents engaged in a subtle form of interrogation during the trip (Pet. App. 9a; Tr. 380-383). However, the FBI agents testified that they did not discuss the present case or any FBI work and did not question petitioner during the ride to the office (Pet. App. 8a; Tr. 353-362, 364-367). The district court credited the FBI agents' suppression hearing testimony and allowed the agents to testify at trial about petitioner's statements (Pet. App. 9a).

[2]Petitioner denied that his girlfriend was involved in "this matter" and stated that he had deliberately quarrelled with her to keep her away from the location of the money drop. He also said that his involvement stemmed from money pressures, but he claimed that he had merely followed the directions of another individual (Pet. App. 7a-8a n.5; Tr. 354-356, 365).

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the application of the Hobbs Act, 18 U.S.C. 1951, to his conduct conflicts with the Ninth Circuit's decision in *United States* v. *Snell*, 550 F. 2d 515 (1977), that the bank robbery statute, 18 U.S.C. 2113, is the exclusive means for punishing extortionate activity directed at a bank. *Snell* has, however, been overruled by the Ninth Circuit in *United States* v. *LaBinia*, 614 F. 2d 1207, 1210, cert. denied, No. 79-6501 (May 27, 1980), so no conflict exists.[3] Moreover, the decision below is plainly correct and does not merit further review.

As both the court below and the Ninth Circuit in *LaBinia* recognized, this Court's decision in *United States* v. *Culbert*, 435 U.S. 371 (1978), forecloses any argument that the Hobbs Act does not reach extortionate conduct otherwise within its reach merely because the same conduct may fall within the coverage of another statute.

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[3]In his petition for certiorari LaBinia alleged a conflict with *United States* v. *Beck*, 511 F. 2d 997 (6th Cir.), cert. denied, 423 U.S. 836 (1975), and *United States* v. *Canty*, 469 F. 2d 114 (D.C. Cir. 1972). *Canty* involved a prosecution for bank robbery and assault with a dangerous weapon. As the D.C. Circuit later pointed out, however, the error in *Canty* lay not in prosecuting on overlapping charges, but rather in multiple sentencing. *United States* v. *Shepard*, 515 F. 2d 1324, 1335 (D.C. Cir. 1975). Here, there is no multiple sentencing.

The Sixth Circuit did hold in *Beck* that convictions for extortion under the Hobbs Act and bank robbery under 18 U.S.C. 2113(b) could not both stand, and stated in passing that the bank robbery statute was intended to be the exclusive proscription for conduct within its coverage. 511 F. 2d at 1000. However, as the court below recognized (Pet. App. 4a n.1), the Sixth Circuit in *Beck* appeared to be concerned about the prospect of multiple sentences for the same conduct, just as the D.C. Circuit was in *Canty*, upon which the *Beck* court principally relied. In any event, *Beck* preceded this Court's decision in *Culbert*, which the court below recognized requires a broad reading of the Hobbs Act.

Culbert, like the present case, involved a conviction under the Hobbs Act based on extortionate conduct directed at a bank president in an effort to obtain money from the bank. The court sustained the conviction,[4] noting the broad scope of the Hobbs Act:

> [T]he statutory language sweeps within it all persons who have "in any way or degree . . . affect[ed] commerce . . . by robbery or extortion." 18 U.S.C. §1951(a) (1976 ed.). These words do not lend themselves to restrictive interpretation; as we have recognized, they "manifest . . . a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States*, 361 U.S. 212, 215 (1960).
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> * * * * *
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> Our examination of the statutory language and the legislative history of the Hobbs Act impels us to the conclusion that Congress intended to make criminal *all conduct within the reach of the statutory language*.

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[4]Petitioner suggests (Pet. 7) that the Court in *Culbert* expressly reserved the issue whether the Hobbs Act applies to extortionate conduct that would also be covered by the bank robbery statute. This suggestion is in error. The Court simply noted, in the footnote upon which petitioner relies, that the U.S. Attorney had conceded on appeal that the *bank robbery statute* did not apply in the particular circumstances of that case and that the Solicitor General had disavowed that concession in this Court. 435 U.S. at 372 n.1. The Court then stated that it expressed no view on the U.S. Attorney's interpretation of the bank robbery statute (*ibid.*). In upholding the conviction, the Court necessarily concluded that the Hobbs Act reached the conduct, and the Court did not intimate that this conclusion was in any way affected by whether the bank robbery statute also applied.

435 U.S. at 373, 380 (emphasis added). The fact that the bank robbery statute may reach the same conduct does not preclude the government from charging petitioner under the Hobbs Act. See *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979); *United States* v. *Naftalin*, 441 U.S. 768, 778 (1979). Because petitioner's conduct clearly fell within the Hobbs Act, the court below properly upheld its application in these circumstances.

2. Petitioner also argues (Pet. 9-11) that his post-arrest statements (see note 2, *supra*) were the product of "subtle in-custody interrogation." He concedes that he was not questioned by the FBI agents (Pet. 11). He claims, however, that after he was advised of his rights and requested counsel, the FBI agents engaged in a conversation much like the "Christian burial speech" at issue in *Brewer* v. *Williams*, 430 U.S. 387 (1977). This claim is without merit.

Petitioner did testify at a hearing on the admissibility of the statements that the FBI agents made remarks to the effect that the extortionate conduct involved in this case was "sloppy," that they could not understand how petitioner's girlfriend became involved, and that this case was not as "professional" as another they were investigating (Pet. App. 9a; Tr. 380-383). But the testimony of the FBI agents contradicted that of petitioner, and the district court credited the agents' testimony.

One of the FBI agents testified that the conversation during the brief trip to the FBI office consisted of "every day chatter" and that there was no conversation pertaining to the present case (Tr. 353, 360). The agent also testified that petitioner offered the statements at issue after long periods of silence because he "apparently felt like he had to say something" (Tr. 361) and that "[t]here was no provocation, or any statements to cause him to

make the statements" (Tr. 362). The other FBI agent testified that there had been no interrogation of petitioner (Tr. 365) and that "very little was said" during the ride (Tr. 366). He also responded in the affirmative to defense counsel's question whether "just all of a sudden [petitioner] started talking and started saying all these words, not out of response to any provocation or any interrogation whatsoever" (Tr. 367).

After receiving this testimony, the district court found that "the FBI did not ask any questions of [petitioner] and that he voluntarily, without any questioning on the part of the FBI agents, made the statements that he made" (Tr. 384; see also *id.* at 386). The court of appeals correctly observed that the "Trial Judge was certainly permitted to credit only the testimony of the FBI agents" and that the "Judge's finding is not clearly erroneous" (Pet. App. 9a). Further review of this factual claim is not warranted. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

Petitioner contends, however, that the courts below did not fully address and dispose of this issue because they concluded only that there had been no direct questioning of petitioner and did not determine whether there had been "subtle in-custody interrogation" that did not involve direct questioning (Pet. 10-11). This Court recently held, in *Rhode Island* v. *Innis*, No. 78-1076 (May 12, 1980), that the *Miranda* safeguards "come into play whenever a person in custody is subjected to either express questioning or its functional equivalent" and that the term "interrogation" in this setting includes words or actions that the police "should know are reasonably likely to elicit an incriminating response from the suspect" (slip op. 9; footnote omitted). But as the court of appeals noted, although the district court's finding "speaks in terms of 'questioning,' it is truly a finding—when read in

context with the rest of the record—that the FBI agents *neither* made *Brewer*-type 'statements' nor posed 'questions' as such" (Pet. App. 9a).[5] Thus, there is no basis for concluding that petitioner was "subjected to either express questioning or its functional equivalent" (*Rhode Island* v. *Innis*, *supra*, slip op. 9).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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Attorney

MAY 1980

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[5]As noted above (see pages 6-7, *supra*), the district court's finding was made after hearing testimony by both FBI agents that not only had there been no "interrogation" (which may have connoted direct questioning), but that there had been no statements or other provocation causing petitioner to make the statements in question.

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